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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 456

MAX SCHMIDT,
Petitioner,

vs.

ALBERT SHELL, MARTHA SHELL, ARTHUR G. JOHNSTON, DOROTHY E. JOHNSTON, EDWARD C. BRICHTA, DORA R. BRICHTA, FRANK W. DOUGLAS, EDITH E. DOUGLAS, DONALD W. TEETER, ANN TEETER, CASPAR J. HEXBERG, PATRICIA M. HEXBERG, KENNETH THUNEN, SHIRLEY THUNEN, GUSTAVE KOTTA, NELDA M. KOTTA, WILLIAM F. MITCHELL, WANDA MITCHELL, PETE C. RODRIGUEZ, NATALIE RODRIGUEZ, HERMAN T. SCHNEIDER, RITA B. SCHNEIDER, ERNEST S. COCCARY, and HELEN A. COCCARY,
Respondents.

RESPONDENTS' REPLY TO PETITION FOR A WRIT OF CERTIORARI to the District Court of Appeal, State of California, First Appellate District, Division One.

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RESPONDENTS' REPLY TO PETITION FOR A WRIT OF CERTIORARI

to the District Court of Appeal, State of California, First Appellate District, Division One.

Respondents herein respectfully submit that no writ of certiorari should issue to review the judgment

of the District Court of Appeal, State of California, First Appellate District, Division One, entered in the above entitled cause on June 29, 1954.

ISSUE DECIDED.

The District Court of Appeal, State of California, First Appellate District, Division One, decided that veterans entering into a contract to purchase a home were not deprived of their common law rights and remedies because of the enumeration of additional remedies available to them under the Veterans' Emergency Housing Act of 1946. That opinion is printed in Appendix B of the Petition for Writ of Certiorari and is reported at 126 A.C.A. 378 and 272 Pac. (2d) 82.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Respondents respectfully submit that the petition herein for writ of certiorari should be denied because:

(1) The California District Court of Appeal decided no federal question of substance;

(2) The issue decided by the State Court concerns only obliquely federal legislation no longer in force or effect;

(3) The decision of the State Court makes unnecessary any consideration of a federal question;

(4) The decision of the California District Court of Appeal is not erroneous.

THE CALIFORNIA DISTRICT COURT OF APPEAL DECIDED NO FEDERAL QUESTION OF SUBSTANCE.

Respondents initially brought the actions involved herein against one Max Schmidt, a building contractor, and others. Respondents' suit was grounded on common law causes of action for breach of contract and for fraud, which causes of action are, of course, recognized in California. Petitioner, Max Schmidt, contended in the trial Court and in the State Court of Appeal that respondents must necessarily be suing on the basis of the federal statute alone. With that theory, respondents herein took issue and that issue was the one which was decided by the State Court.

In its opinion, the District Court of Appeal merely held that persons contracting to purchase a home from a builder lose none of their common law rights merely because they are veterans, and because veterans have additional privileges conferred upon them by the Veterans' Emergency Housing Act of 1946. This decision of the State Court in no way falls within the purview or spirit of Rule 38, Subsection 5.

THE ISSUE DECIDED IN THE STATE COURT CONCERNS ONLY OBLIQUELY FEDERAL LEGISLATION NO LONGER IN FORCE OR EFFECT.

The Veterans' Emergency Housing Act of 1946 (60 Stat. 207, 50 U.S.C.A. Appendix 1821, et seq.) was not a controlling statute so far as the issues which were before the State Court in this action. A reading of the State Court's decision indicates that the judgment in favor of respondents herein was based

entirely on a factual finding by a jury that there was a breach of common law contract between respondents and petitioner. The State Court affirmed the finding of the jury on the same basis. As stated in the State Court's opinion:

> "Respondents' theory is that they are suing on common law causes of action *not* grounded on the Veterans' Emergency Housing Act and that the federal statute is only relevant as setting up standards against which to measure the acts of the appellant in failing to perform according to the plans and specifications required by that statute." (Emphasis ours.)

We respectfully submit that although petitioner *claims* that the State Court held that a federal statute was the controlling aspect of its decision, the plain fact is that the State Court decision itself states that this is not so.

Petitioner also contends that the issue decided in this case is of importance in the administration of federal housing laws. This we think is an erroneous projection of the scope of the Veterans' Emergency Housing Act of 1946. That Act, by its terms, applied to a very narrow field of housing. It appelied to a very narrow group of persons and that Act was repealed in 1947. Quite apparently, any implications of the State Court decision in this case would be limited to that Act only and could have no possible bearing on any later legislation in the general field of housing.

The cases cited by petitioner involve actions brought specifically under the Veterans' Emergency Housing

Act of 1946 and not on common law grounds not requiring the aid of the Act. In *United States v. Sauers*, 99 F. Supp. 753 (D.C. Minn. 3rd Division), the government brought an action specifically under Section 7 A and C of the Act. In *United States v. Austin*, 100 F. Supp. 33 (D.C. Md.), the government brought an action under Section 7 A of the Act. In the case at bar, the only issue before the State Court was whether veteran purchasers of homes retained *common law rights*, despite the enumeration of other rights in a federal statute. *United States v. Austin*, supra, though not decisive of that issue, points rather clearly to the fact that the State Court decision is correct in principle. In that case, it was recognized that the government could seek restitution even though the Second War Powers Act of 1942 did not provide for this remedy. That case is merely one example of the well-recognized principle that an enumeration of remedies in remedial legislation does not abrogate rights or remedies which pre-existed the legislation.

THE DECISION OF THE STATE COURT MAKES UNNECESSARY ANY CONSIDERATION OF A FEDERAL QUESTION.

A reading of the State Court decision indicates that there were twelve sets of plaintiffs initially. The verdict of the jury in favor of the twelve sets of plaintiffs was based both on a breach of contract and on fraud practiced upon them. The California District Court of Appeal found that as to three sets of these plaintiffs, the judgment on the basis of fraud was

sustainable and that this judgment in no way required any consideration of federal legislation.

All plaintiffs joined in a thirteenth cause of action. The District Court of Appeal held that the thirteenth cause of action was supported on a non-federal ground. That ground was the one based on a breach of contract. It is our understanding that under such facts this Honorable Court will not consider the issues sufficient for the granting of certiorari. (*Application of Bayer,* 169 Fed. (2d) 770.)

THE DECISION OF THE CALIFORNIA DISTRICT COURT OF APPEAL IS NOT ERRONEOUS.

The only issue before the State Court was whether veterans who under California law had common-law remedies of breach of contract and actions for fraud under proper factual circumstances were deprived of those common law rights by the passage of the Veterans' Emergency Housing Act of 1946, in which Act certain additional remedies were set out. Neither respondents nor petitioner have been able to find a decision directly holding that under the Veterans' Emergency Housing Act of 1946 common law remedies of a purchaser remain in effect. However, under similar statutes similar issues have been presented to Federal Courts and have been decided in conformity with the decision of the District Court of Appeal in this case.

As pointed out in the opinion of the California District Court of Appeal, *Heinecke v. Parr,* 168 F.

(2d) 194, and *Keele v. Holt,* 171 F. (2d) 480, held that although, under the Second War Powers Act of 1942, neither that statute nor regulation 33 provided for actions for restitution or for an overcharge, such actions would lie under general equitable or common law principles. Under those cases, the common law remedies were held to exist *in addition* to those granted by statute. As noted above, in *United States v. Austin,* supra, it was recognized that the government would have an action for restitution even though the statute involved did not provide for this specific remedy. In *Adams v. Albany,* 80 F. Supp. 876, it was indicated, by way of dicta, that common law remedies existed under the Veterans' Emergency Housing Act of 1946.

CONCLUSION.

For the foregoing reasons, we respectfully submit that the petition for writ of certiorari should be denied.

Dated, Redwood City, California,
December 10, 1954.

Respectfully submitted,
ROPERS & MAJESKI,
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